

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: MDL Docket No 06-1791 VRW
NATIONAL SECURITY AGENCY
TELECOMMUNICATIONS RECORDS
LITIGATION

Case No C 07-0109 VRW

This order pertains to:

AL-HARAMAIN ISLAMIC
FOUNDATION, INC, an Oregon
Nonprofit Corporation; WENDELL
BELEW, a United States Citizen
and Attorney at Law; ASIM
GHAFOOR, a United States Citizen
and Attorney at Law,

MEMORANDUM OF DECISION
AND ORDER

Plaintiffs,

v

BARACK H OBAMA, President of the
United States; NATIONAL SECURITY
AGENCY and KEITH B ALEXANDER,
its Director; OFFICE OF FOREIGN
ASSETS CONTROL, an office of the
United States Treasury, and ADAM
J SZUBIN, its Director; FEDERAL
BUREAU OF INVESTIGATION and
ROBERT S MUELLER III, its
Director, in his official and
personal capacities,

Defendants.

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SUMMARY OF DECISION

Plaintiffs seek an order finding defendants civilly liable to them under section 1810 of the Foreign Intelligence Surveillance Act ("FISA"), 50 USC §§ 1801-71, for eavesdropping on their telephone conversations without a FISA warrant. In the course of lengthy proceedings in this court and the court of appeals, described more fully in the decision that follows, this court determined that: FISA affords civil remedies to "aggrieved persons" who can show they were subjected to warrantless domestic national security surveillance; FISA takes precedence over the state secrets privilege in this case; a prima facie case of unlawful electronic surveillance under FISA requires plaintiffs to present to the court specific facts based on non-classified evidence showing that they are "aggrieved persons"; and plaintiffs have met their burden of establishing their "aggrieved person" status using non-classified evidence. Because defendants denied plaintiffs' counsel access to any classified filings in the litigation, even after top secret clearances were obtained for plaintiffs' counsel and protective orders suitable for top secret documents proposed, the court directed the parties to conduct this phase of the litigation without classified evidence. Both plaintiffs' motion for summary judgment of liability and defendants' cross-motions for dismissal and for summary judgment were, therefore, based entirely on non-classified evidence.

The court now determines that plaintiffs have submitted, consistent with FRCP 56(d), sufficient non-classified evidence to establish standing on their FISA claim and to establish the absence of any genuine issue of material fact regarding their allegation of

1 unlawful electronic surveillance; plaintiffs are therefore entitled
2 to summary judgment in their favor on those matters. Defendants'
3 various legal arguments for dismissal and in opposition to
4 plaintiffs' summary judgment motion lack merit: defendants have
5 failed to meet their burden to come forward, in response to
6 plaintiffs' prima facie case of electronic surveillance, with
7 evidence that a FISA warrant was obtained, that plaintiffs were not
8 surveilled or that the surveillance was otherwise lawful.

9 In the absence of a genuine issue of material fact
10 whether plaintiffs were subjected to unlawful electronic
11 surveillance within the purview of FISA and for the reasons fully
12 set forth in the decision that follows, plaintiffs' motion for
13 summary judgment on the issue of defendants' liability under FISA
14 is GRANTED. Defendants' motion to dismiss the amended complaint
15 for lack of jurisdiction is DENIED and defendants' cross-motion for
16 summary judgment is DENIED. Because the court has determined that
17 the sole defendant sued in both official and individual capacities
18 acted wholly in his official capacity and not as an individual, the
19 individual-capacity claims are DISMISSED.

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DECISION

Contending that United States government officials acting without warrants intercepted and eavesdropped on their international telephone conversations, plaintiffs Al-Haramain Islamic Foundation, Inc, an Oregon nonprofit corporation ("Al-Haramain"), and Wendell Belew and Asim Ghafoor, individuals who allege they are United States citizens and attorneys for Al-Haramain, seek summary judgment of liability on their FISA claim. Doc #657/099.¹ Defendants, certain high-ranking government officials and associated government agencies, oppose plaintiffs' motion and bring their fourth motion for dismissal and/or summary judgment. Doc #668/103. In compliance with the court's orders of June 3 and June 5, 2009, Doc #643/096, the parties have presented only non-classified evidence to the court in support of these motions. Upon consideration of that evidence and the arguments presented by the parties, the court now GRANTS plaintiffs' motion and DENIES defendants' motions. The court on its own motion dismisses all claims against defendant FBI Director Robert Mueller in his individual capacity.

I

Plaintiffs filed their lawsuit in the United States District Court for the District of Oregon on February 28, 2006. Their complaint alleged that plaintiffs had been subject to warrantless electronic surveillance and sought civil damages under

¹ Documents will be cited both to the MDL docket number (No M 06-1791) and to the individual docket number (No C 07-0109) in the following format: Doc #xxx/yyy.

1 section 1810 of the Foreign Intelligence Surveillance Act, 50 USC
2 §§ 1801-71 (West 2009) ("FISA"). Plaintiffs also alleged
3 violations of the separation of powers principle, the First, Fourth
4 and Sixth Amendments of the United States Constitution and the
5 International Covenant on Civil and Political Rights. Along with
6 their complaint, plaintiffs filed under seal a copy of what has
7 been referred to throughout this litigation as the "Sealed
8 Document," a classified document that had inadvertently been
9 disclosed by defendant Office of Foreign Assets Control ("OFAC") to
10 counsel for Al-Haramain as part of a production of unclassified
11 documents relating to Al-Haramain's designation as a "Specially
12 Designated Global Terrorist" ("SDGT") organization.² Al-Haramain
13 Islamic Foundation, Inc v Bush, 451 F Supp 2d 1215, 1218 (D Or
14 2006). The previous phases of this litigation largely focused on
15 whether plaintiffs could use the Sealed Document.

16 Defendants filed their first motion for dismissal or for
17 summary judgment, arguing that the Sealed Document could not be
18 used in the litigation and that the common-law state secrets
19 privilege ("SSP") required dismissal of the case. Id at 1217. The
20 Oregon district court (King, J) denied the motion, explaining that
21 "plaintiffs should have an opportunity to establish standing and
22 make a prima facie case, even if they must do so in camera." Id at
23 1226-27. The court noted that "plaintiffs need some information in
24 the Sealed Document to establish their standing and a prima facie
25 case, and they have no other available source for this

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27 ² Under Executive Order 13224, a SDGT designation authorizes the
28 Department of the Treasury to block assets and prohibit transactions
with designated individuals and organizations.

information," id at 1221, and that given defendants' many public acknowledgments of the warrantless electronic surveillance program beginning in 2005, the program itself was not a secret. Id at 1221-23. Nonetheless, the court determined that the Sealed Document remained highly classified, ordered plaintiffs to hand over all copies of the Sealed Document to the court, refused media requests to unseal records and plainly contemplated maintaining the secrecy of the Sealed Document while proceeding with the litigation. Id at 1229, 1232.

The Oregon district court declined to reach the question whether "FISA preempts the [SSP]." Id at 1229. The court observed: "[t]o accept the government's argument that Section 1806(f) is only applicable when the government intends to use information against a party would nullify FISA's private remedy [under section 1810] and would be contrary to the plain language of Section 1806(f)." Id at 1231. The court certified its other rulings for interlocutory appeal. During the pendency of the appeal, this case was reassigned by the Judicial Panel on Multidistrict Litigation (MDL) to the undersigned.

The court of appeals considered three issues on interlocutory review: (1) whether the very subject matter of the litigation is a state secret; (2) whether Al-Haramain can establish standing to bring suit, absent the Sealed Document; and (3) whether Al-Haramain can establish a prima facie case, and the government can defend against Al-Haramain's assertions, without resorting to state secrets. In a footnote, the court of appeals observed that the third issue had not been addressed by the district court. 507 F3d at 1197 & n 4.

1 As to the first issue, the court of appeals held that
2 while Al-Haramain's case involved privileged information, "that
3 fact alone does not render the very subject matter of the action a
4 state secret" and affirmed the district court's denial of dismissal
5 on that basis. 507 F3d at 1201.

6 The court of appeals determined that defendants had
7 properly invoked the SSP and, based on Al-Haramain's "showing of
8 necessity" or "admittedly substantial need for the document to
9 establish its case," quoting United States v Reynolds, 345 US 1, 10
10 (1953), conducted an in camera review of the Sealed Document. 507
11 F3d at 1203. Based on that review, the court wrote: "We are
12 satisfied that the basis for the privilege is exceptionally well
13 documented" and that disclosure of "information concerning the
14 Sealed Document and the means, sources and methods of intelligence
15 gathering in the context of this case would undermine the
16 government's capabilities and compromise national security." 507
17 F3d at 1204. The court of appeals then held: "The Sealed
18 Document, its contents, and any individuals' memories of its
19 contents, even well-reasoned speculation as to its contents, are
20 completely barred from further disclosure in this litigation by the
21 common law [SSP]." Id.

22 The court of appeals next turned to the question of Al-
23 Haramain's standing and determined that plaintiffs could not
24 establish standing to proceed with their lawsuit without the Sealed
25 Document because they could not establish a "concrete and
26 particularized" injury-in-fact under the principles set forth in
27 Lujan v Defenders of Wildlife, 504 US 555 (1992), unless the courts
28 determined that FISA, rather than the SSP, governed this case:

1 "Al-Haramain cannot establish that it has standing, and its claims
2 must be dismissed, unless FISA preempts the [SSP]." 507 F3d at
3 1205. As noted above, the Oregon district court had declined to
4 rule on this complex issue, which now had become pivotal to the
5 fate of the litigation.

6 On the basis of the rule set forth in Singleton v Wulff,
7 428 US 106 (1976), that a court of appeals should not ordinarily
8 consider an issue not ruled on in the district court, the court of
9 appeals declined to decide whether FISA preempts the SSP. Instead,
10 writing that "the FISA issue remains central to Al-Haramain's
11 ability to proceed with this lawsuit," it remanded the case to this
12 court to consider that question "and for any proceedings collateral
13 to that determination." 507 F3d at 1206. The court of appeals did
14 not comment either on the likely consequences of a determination by
15 this court that FISA preempted the SSP for this litigation in
16 general or for the Sealed Document's role in this litigation in
17 particular.

18 Following remand, defendants filed a second motion to
19 dismiss plaintiffs' claims (Doc #432/017), asserting, inter alia,
20 that: FISA did not preempt the SSP; the SSP presented
21 insurmountable obstacles to plaintiffs' action; plaintiffs lacked
22 standing to seek prospective relief; and the doctrine of sovereign
23 immunity barred recovery under FISA's section 1810. Plaintiffs
24 argued that FISA preempted the SSP and that dismissal would be
25 improper. By order dated July 2, 2008, the court held that FISA's
26 legislative history unequivocally established Congress's intent that
27 FISA preempt or displace the SSP in cases within the reach of its
28 provisions. In Re National Security Agency Telecommunications

1 Records Litigation ("In re NSA Telecom Litigation"), 564 F Supp 2d
2 1109, 1124 (N D Cal 2008). The court noted, however, the
3 substantial obstacles facing any litigant hoping to bring an action
4 for damages under FISA's section 1810, which the court described as
5 "not user-friendly." Id at 1136.

6 Specifically, the court noted, unlike the electronic
7 surveillance carried out by federal law enforcement agencies under
8 the general wiretap statute, Title III, 18 USC §§ 2510-22, much of
9 the electronic surveillance undertaken for national security
10 purposes does not result in criminal proceedings in which the
11 existence of the surveillance evidence would be disclosed as a
12 matter of course. Moreover, unlike Title III, FISA does not require
13 that the target of an electronic surveillance ever be informed of
14 its occurrence. The July 2 order detailed FISA's provisions
15 requiring certain agencies to report periodically to Congress on the
16 number of warrants applied for and other actions taken under FISA.
17 The July 2 order, meanwhile, underscored the absence of any regular
18 legal mechanism by which an individual who had been subject to
19 electronic surveillance within FISA's purview could learn of the
20 surveillance. 564 F Supp 2d at 1125-30.

21 A further obstacle to litigation under section 1810, the
22 court noted, is "the lack of a practical vehicle for obtaining
23 and/or using admissible evidence * * * sufficient to establish
24 standing to proceed as an aggrieved party and, later, to withstand
25 motions for dismissal and/or summary judgment." 564 F Supp 2d at
26 1131. The court, however, noted that FISA's section 1806(f)
27 provides for United States district courts to conduct in camera
28 reviews of "applications or orders or other materials relating to

1 electronic surveillance" in certain narrowly-defined circumstances
2 "to determine whether the surveillance of the aggrieved person was
3 lawfully authorized and conducted." 564 F Supp 2d at 1131 (quoting
4 section 1806(f)). Hence, section 1806(f) could be used to discover
5 evidence of electronic surveillance for purposes of establishing
6 "aggrieved person" status within the meaning of FISA's
7 section 1801(k) if an individual had a "colorable basis for
8 believing he or she had been surveilled." 564 F Supp 2d at 1133.
9 50 USC § 1801(k) defines an "aggrieved person" as "a person who is
10 the target of an electronic surveillance or any other person whose
11 communications or activities were subject to electronic
12 surveillance." The court ruled that plaintiffs "must first
13 establish 'aggrieved person' status without the use of the Sealed
14 Document and may then bring a 'motion or request' under § 1806(f)
15 * * *." Id at 1134.

16 Noting that the civil liability provision of Title III (18
17 USC § 2520) had been in effect for a decade when FISA was enacted
18 and therefore could have served as a model had Congress intended
19 FISA's civil liability provision to resemble Title III's, the court
20 wrote that although "Congress enacted section 1810 in order to
21 provide a private cause of action for unlawful surveillance, section
22 1810 bears but faint resemblance to 18 USC section 2520. While the
23 court must not interpret and apply FISA in a way that renders
24 section 1810 superfluous * * * the court must be wary of unwarranted
25 interpretations of FISA that could make section 1810 a more robust
26 remedy than Congress intended it to be." 564 F Supp 2d at 1135.
27 Accordingly, the court determined that among approaches employed
28 within the Ninth Circuit for making out a prima facie case of

1 electronic surveillance, the more stringent end of the spectrum was
2 appropriate for FISA cases and that "plaintiffs' showing thus far
3 with the Sealed Document excluded falls short of the mark." Id at
4 1134-35. The court dismissed plaintiffs' complaint with leave to
5 amend, explaining: "[t]o proceed with their FISA claim, plaintiffs
6 must present to the court enough specifics based on non-classified
7 evidence to establish their 'aggrieved person' status under FISA."
8 Id.

9 Plaintiffs timely filed an amended pleading, the First
10 Amended Complaint ("FAC"). Doc #458/035. It named generally the
11 same defendants but replaced one office-holder with his replacement
12 and specified that plaintiffs were suing one defendant in both his
13 official and individual capacities.³ Id at 1-2 & ¶¶ 7-13. The FAC
14 retained the same six causes of action as the original complaint,
15 including, as relevant here, one cause of action under FISA
16 encompassing both a request under 50 USC § 1806(g) for suppression
17 of evidence obtained through warrantless electronic surveillance and
18 a claim for damages under section 1810. Doc #458/035 at 14.

19 The most noteworthy change in the FAC was the ten-fold
20 expansion of plaintiffs' factual recitation, which newly detailed a
21 number of public pronouncements by government officials and
22 publicly-available press reports disclosing post-9/11 warrantless
23 electronic surveillance activities, as well as events publicly known
24 about these activities, such as a much-publicized hospital room
25 confrontation between former Attorney General John Ashcroft and

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27 ³ Pursuant to FRCP 25(d), President Barack H Obama is now
28 substituted for former President George W Bush because a suit against
a government official in his or her official capacity is deemed to be
against the current holder of the office.

1 then-White House counsel (later Attorney General) Alberto Gonzales.
2 Id at 5. The FAC also recited a sequence of events pertaining
3 directly to the government's investigations of Al-Haramain, a sine
4 qua non, in the court's view, to establishing their "aggrieved
5 person" status.

6 The FAC may be briefly summarized in the following two
7 paragraphs:

8 Various government officials admitted the existence of a
9 program of warrantless surveillance under which the NSA was
10 authorized by the President to intercept certain international
11 communications in which one party was outside the United States and
12 one party was reasonably believed to be a member or agent of
13 international terrorist network al-Qaeda or an affiliated terrorist
14 organization. FAC ¶¶ 16-18. Al-Haramain's assets were blocked by
15 the Treasury Department in February 2004 pending an investigation of
16 "possible crimes relating to currency reporting and tax laws," but
17 neither OFAC's press release nor March 2004 congressional testimony
18 of a FBI official about the investigation suggested that Al-Haramain
19 had links to al-Qaeda. FAC ¶¶ 24-26, 30. In June 2004, an OFAC
20 official testified in Congress that in investigating terrorist
21 financing, OFAC used classified information sources. FAC ¶ 28.

22 Between March and June 2004, several phone conversations
23 took place between plaintiffs Belew and Ghafoor in the United States
24 on the one hand and Soliman al-Buthi, a director of Al-Haramain
25 located in Saudi Arabia, on the other; in these conversations, the
26 participants made reference to various individuals associated with
27 Osama bin-Laden, the founder of al-Qaeda. FAC ¶¶ 32-35. In
28 September 2004, OFAC formally designated Al-Haramain as a SDGT

1 organization and, in a press release, specifically cited "direct
2 links between the US branch [of Al-Haramain]" and Osama bin-Laden;
3 this was the first "public claim of purported links between [] Al-
4 Haramain and [] bin-Laden." FAC ¶¶ 30-35, 39-40. The FBI and the
5 Treasury Department have stated publicly that they relied on
6 classified information, including "surveillance" information, to
7 designate Al-Haramain as a terrorist organization associated with
8 al-Qaeda and bin-Laden. FAC ¶¶ 36-43. In testimony before Congress
9 in 2006 and 2007, top intelligence officials including defendant
10 Keith B Alexander stated that a FISA warrant is required before
11 certain wire communications in the United States can be intercepted.
12 FAC ¶ 48. In a separate criminal proceeding against Ali al-Timimi
13 in 2005, the government disclosed that it had intercepted
14 communications between al-Timimi and Al-Haramain's director
15 al-Buthi. FAC ¶ 51.

16 The FAC's allegations also appear in the court's statement
17 of material facts not genuinely at issue in section III B, *infra*.

18 On September 30, 2008, the parties filed cross-motions.
19 Plaintiffs moved under FISA's section 1806(f) for discovery of
20 evidence pertaining to the lawfulness of the alleged surveillance.
21 Doc #472/046. Defendants brought their third motion to dismiss or,
22 in the alternative, for summary judgment. Doc #475/049.

23 In support of their motion under section 1806(f), as noted
24 above, plaintiffs submitted evidence substantiating the allegations
25 of their FAC. In addition to numerous documents drawn from United
26 States government websites and the websites of news organizations
27 (exhibits to Doc #472-1/046-1, *passim*), plaintiffs submitted the
28 sworn declarations of plaintiffs Belew and Ghafoor attesting to the

1 specifics and contents of the telephone conversations described in
2 paragraphs 32 and 33 of the FAC. Doc ##472-6/046-6, 472-7/046-7.

3 Defendants' third motion to dismiss (Doc #475/049) largely
4 ignored the court's prior rulings regarding FISA's displacement of
5 the SSP in this case and the necessity of giving effect to Congress'
6 intent in enacting FISA's section 1810. Instead, defendants
7 reiterated standing arguments made previously (at 16-17), asserted
8 that "the law does not support an attempt to adjudicate whether the
9 plaintiffs are 'aggrieved persons' in the face of the Government's
10 successful [SSP] assertion" (at 27-30) and contended that the
11 adjudication of 'aggrieved person' status for any or all plaintiffs
12 could not be accomplished without revealing information protected by
13 the SSP. As for the standard required for a plaintiff to establish
14 "aggrieved person" status under section 1810, defendants contended
15 that only the government's frank admission of the unlawful
16 electronic surveillance and active cooperation in the litigation
17 against it under FISA would suffice. They also requested
18 interlocutory appellate review of the court's orders following
19 remand. Id at 31.

20 In its order of January 5, 2009, the court ruled that
21 plaintiffs had made out a prima facie case that they are "aggrieved
22 persons" who had been subjected to "electronic surveillance" within
23 the meaning of section 1810. In doing so, the court employed the
24 analysis and standard for establishing a prima facie case of
25 electronic surveillance used by the Ninth Circuit in United States v
26 Alter, 482 F2d 1016 (9th Cir 1973) (applying 18 USC § 3504(a)(1))
27 and more recently by the DC Circuit in In re Sealed Case (Horn v
28 Huddle), 494 F3d 139 (DC Cir 2007), a case in which, as in Al-

1 Haramain, the plaintiff sought damages under FISA's section 1810.
2 In re NSA Telecom Litigation, 595 F Supp 2d at 1083-84.

3 The court explained that the approach employed in Alter
4 was appropriate in this case arising under FISA's section 1810 given
5 the lack of precedent in the Ninth Circuit because the Alter test's
6 "stringency makes it appropriate in cases arising in the somewhat
7 more restrictive environment where national security dimensions are
8 present." 595 F Supp 2d at 1084.

9 The court rejected defendants' contention that only when
10 the government has openly acknowledged conducting warrantless
11 electronic surveillance of an individual can that individual
12 establish standing to sue:

13 The court declines to entertain further challenges to
14 plaintiffs' standing; the July 2 order gave
15 plaintiffs the opportunity to "amend their claim to
16 establish that they are 'aggrieved persons' within
17 the meaning of 50 USC § 1801(k)." Plaintiffs have
18 alleged sufficient facts to withstand the
19 government's motion to dismiss. To quote the Ninth
20 Circuit in Alter, "[t]he [plaintiff] does not have to
21 plead and prove his entire case to establish standing
22 and to trigger the government's responsibility to
23 affirm or deny." Contrary to defendants' assertions,
24 proof of plaintiffs' claims is not necessary at this
25 stage. The court has determined that the allegations
26 "are sufficiently definite, specific, detailed, and
27 nonconjectural, to enable the court to conclude that
28 a substantial claim is presented."

22 595 F Supp 2d at 1085 (citations omitted). The court concluded:
23 "[w]ithout a doubt, plaintiffs have alleged enough to plead
24 'aggrieved person' status so as to proceed to the next step in the
25 proceedings under FISA's sections 1806(f) and 1810." Id at 1086.

26 The January 5 order announced several next steps in the
27 litigation that were designed to prioritize two interests:

28 \\\

1 "protecting classified evidence from disclosure and enabling
2 plaintiffs to prosecute their action." Id at 1089.

3 The court announced its intention to review the Sealed
4 Document ex parte and in camera, then to issue an order stating
5 whether plaintiffs could proceed — specifically, whether the Sealed
6 Document established that plaintiffs were subject to electronic
7 surveillance not authorized by FISA. The court explained:

8 As the court understands its obligation with regard
9 to classified materials, only by placing and
10 maintaining some or all of its future orders in this
11 case under seal may the court avoid indirectly
12 disclosing some aspect of the Sealed Document's
13 contents. Unless counsel for plaintiffs are granted
14 access to the court's rulings and, possibly, to at
15 least some of defendants' classified filings,
16 however, the entire remaining course of this
17 litigation will be ex parte. This outcome would
18 deprive plaintiffs of due process to an extent
19 inconsistent with Congress's purpose in enacting
20 FISA's sections 1806(f) and 1810.

21 595 F Supp 2d at 1089. The order directed the government to begin
22 processing security clearances for members of plaintiffs' litigation
23 team so that they would be able to read and respond to sealed
24 portions of the court's future orders and, if necessary, some
25 portion of defendants' classified filings.

26 The court also directed defendants to review their
27 classified submissions to date and to determine whether the Sealed
28 Document and/or any of defendants' classified submissions could be
29 declassified. Upon completion of this review, defendants informed
30 the court that nothing they had filed under seal during the three
31 years in which the case had by then been pending could be
32 declassified. Doc #577/078.

33 What followed were several months of which the defining
34 feature was defendants' refusal to cooperate with the court's

1 orders punctuated by their unsuccessful attempts to obtain untimely
2 appellate review. Expressing alarm that the January 5 order would
3 result in the disclosure of privileged information without the
4 opportunity for further review, defendants sought interlocutory and
5 direct appeal. Doc #544/059; 545/060. The court denied
6 defendants' request to certify the case for interlocutory review
7 and the court of appeals dismissed defendants' appeal for lack of
8 jurisdiction because no disclosure of classified information had
9 been ordered by the court. Doc #562/071 and Al-Haramain Islamic
10 Foundation, Inc v Obama, No 09-15266 (9th Cir February 27, 2009).

11 In response to the court's directive to "inform the court
12 how [they intend] to comply with the January 5 order" (Doc #562/071
13 at 3), defendants presented three similar-sounding alternatives,
14 all of which appeared geared toward obtaining a stay of this
15 court's proceedings pending review by the court of appeals. Doc
16 #600/084 at 1-2. The court next ordered the parties to meet and
17 confer regarding the entry of an appropriate protective order,
18 noting that the United States District Court for the District of
19 Columbia had successfully used protective orders for highly
20 classified information in the In Re Guantánamo Bay Detainee
21 Litigation, D DC No Misc 08-0442 TFH, and that defendants had given
22 no reason why a such a protective order would not adequately
23 protect the classified information at issue in this case. Id at 2.

24 Next, after the United States completed suitability
25 determinations for two of plaintiffs' attorneys and found them
26 suitable for top secret/secure compartmented information ("TS/SCI")
27 clearances, government officials in one or more defendant agencies,
28 including defendant Keith B Alexander, refused to cooperate with

1 the court's orders, asserting that plaintiffs' attorneys did not
2 "need to know" the information that the court had determined
3 plaintiffs attorneys would need in order to participate in the
4 litigation. Declaration of Ariane E Cherlenko [NSA] in Support of
5 Defendants' Motion of Stay Pending Appeal and for Certification of
6 an Interlocutory Appeal, Doc #545-1/060-1 at 5. Moreover,
7 according to the parties' joint submission regarding a protective
8 order (Doc #626/089 at 35), defendants refused to agree to any
9 terms of the protective order proposed by plaintiffs and refused to
10 propose one of their own. Doc #630/090 at 3.

11 The court ordered defendants to show cause why, as a
12 sanction for failing to obey the court's orders: (1) defendants
13 should not be prohibited, under FRCP 37(b)(2)(ii), from opposing
14 the liability component of plaintiffs' claim under 50 USC § 1810 —
15 that is, from denying that plaintiffs are "aggrieved persons" who
16 had been subjected to electronic surveillance; and (2) the court
17 should not deem liability under 50 USC § 1810 established and
18 proceed to determine the amount of damages to be awarded to
19 plaintiffs. The court also ordered plaintiffs to submit a
20 memorandum addressing whether it would be appropriate for them to
21 file a motion for summary judgment on their FISA claim. Doc
22 #630/090 at 3.

23 After hearing argument on the order to show cause, the
24 court directed plaintiffs to move for summary judgment on their
25 FISA claim relying only on non-classified evidence. See Doc
26 #643/096. It further ordered that if and only if defendants were
27 to rely upon the Sealed Document or other classified evidence in
28 response, the court would enter a protective order and produce such

classified evidence to plaintiffs' counsel who have obtained security clearances. Id.

The instant cross-motions ensued.

II

Turning first to defendants' motion to dismiss, defendants move under Rule 12(b)(1) for dismissal of plaintiffs' FAC arguing that: (1) plaintiffs lack standing to obtain prospective declaratory or injunctive relief with respect to alleged warrantless surveillance under the Terrorist Surveillance Program ("TSP") because the TSP lapsed or was terminated in January 2007 and (2) the court lacks jurisdiction to review plaintiffs' claim for retrospective damages against the United States under section 1810 of FISA, because section 1810 assertedly does not expressly waive the sovereign immunity of the United States.

Defendants' first argument for dismissal attacks plaintiffs' non-FISA claims, arguing that these claims seek only "prospective declaratory and injunctive relief against alleged TSP surveillance" and that such relief is not available because the TSP ended in January 2007. Doc #668/103 at 18-19. This mootness argument is essentially a re-tread of standing arguments made in March 2008 that were also based on the TSP's purported January 2007 termination. Doc #432/017 at 17. Defendants further assert: "declaratory and injunctive relief are equitable and should for similar reasons be denied as a prudential matter." Doc #668/103 at 19. But defendants' argument rests on a mistaken premise; plaintiffs' prayer for relief seeks various items of equitable relief, but most are not predicated on the continued existence of

1 the TSP or other wiretapping activities. Doc #458/035 at 16.
2 Plaintiffs seek, for example, a declaration that defendants'
3 warrantless surveillance of plaintiffs "is" unlawful, which may be
4 construed to encompass past surveillance; and orders requiring
5 defendants to turn over to plaintiffs, purge and/or destroy files
6 and records containing information obtained by means of unlawful
7 electronic surveillance. Defendants do not explain what prudential
8 considerations would prohibit such equitable relief, and the court
9 is aware of none.

10 Defendants' second argument for dismissal is a familiar
11 one; indeed, defendants admit that they have made it before, noting
12 that "the Government respectfully and briefly preserves its
13 position that Section 1810 of the FISA does not waive the sovereign
14 immunity of the United States." Doc #668/103. The court
15 considered and ruled on this issue in its order of July 2, 2008:

16 It is, of course, true that section 1810 does not
17 contain a waiver of sovereign immunity analogous to
18 that in 18 USC section 2712(a) which expressly
19 provides that aggrieved persons may sue the United
20 States for unlawful surveillance in violation of Title
21 III. But FISA directs its prohibitions to "Federal
22 officers and employees" (see, e g, 50 USC §§ 1806,
23 1825, 1845) and it is only such officers and employees
24 acting in their official capacities that would engage
in surveillance of the type contemplated by FISA. The
remedial provision of FISA in section 1810 would
afford scant, if any, relief if it did not lie against
such "Federal officers and employees" carrying out
their official functions. Implicit in the remedy that
section 1810 provides is a waiver of sovereign
immunity.

25 In re NSA Telecom Litigation, 564 F Supp 2d at 1125. The court's
26 view of this issue has not changed.

27 Accordingly, the motion to dismiss for lack of
28 jurisdiction is DENIED.

III

The parties' cross-motions for summary judgment present more substantial questions. Rule 56(a) of the Federal Rules of Civil Procedure provides: "A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim." Rule 56(d)(2) provides: "An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages." Rule 56(d)(1), moreover, provides that "the court should, to the extent practicable, determine what material facts are not genuinely at issue."

Plaintiffs' motion seeks summary adjudication of two issues: (1) plaintiffs' Article III standing and (2) defendants' liability under FISA's civil liability provision, 50 USC § 1810. Doc #657/099. Defendants cross-move for summary judgment on plaintiffs' FISA claim and "any remaining claim," arguing that: (1) the Ninth Circuit's mandate in this case "forecloses" plaintiffs' motion; (2) plaintiffs' evidence is too conjectural or circumstantial to establish that plaintiffs are "aggrieved persons" for FISA purposes; and (3) all other potentially relevant evidence — including whether the government possessed a FISA warrant authorizing surveillance of plaintiffs — is barred from disclosure by operation of the SSP. Doc #668/103.

Of particular note concerning these motions is the principle that: "[W]hen parties make cross-motions for summary judgment, they are not thereby relieved from filing materials in opposition to the other party's motion." William W Schwarzer, Alan Hirsch & David J Barrans, The Analysis and Decision of Summary

1 Judgment Motions: A Monograph on Rule 56 of the Federal Rules of
2 Civil Procedure 74 (Federal Judicial Center 1991).

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4 A

5 Plaintiffs have submitted twenty-eight public documents
6 and two declarations as evidence in support of their motion.
7 Defendants had submitted many of the same documents in support of
8 their third motion to dismiss and for summary judgment (Doc
9 #475/049) (see section III B, infra) and plaintiffs had submitted
10 all but two of the items in support of plaintiffs' motion for
11 discovery under FISA section 1806(f) (see declaration of Jon B
12 Eisenberg in support of motion pursuant to 50 USC § 1806(f) to
13 discover or obtain material relating to electronic surveillance,
14 Doc #472-1/046-1). Not previously submitted are the government's
15 so-called "white paper" by the United States Department of Justice
16 dated January 19, 2006 under the heading "Legal Authorities
17 Supporting the Activities of the [NSA] Described by the President"
18 (Declaration of Jon B Eisenberg ("Eisenberg Decl") Exh AA, Doc
19 #657-5/099-5) and the amicus brief submitted in ACLU v NSA, 493 F2d
20 644 (6th Cir 2007), by the Center for National Security Studies and
21 the Constitution Project (Eisenberg Decl Exh BB, Doc #657-5/099-5).
22 These new items do not bear specifically on defendants' alleged
23 surveillance of Al-Haramain. Plaintiffs also submit the
24 declarations of plaintiffs Asim Ghafoor and Wendell Belew (Doc ##
25 657/099-6; 657/099-7). The substance of these declarations is
26 identical to that of the Ghafoor and Belew declarations submitted
27 in support of plaintiffs' motion under section 1806(f). Doc ##472-
28 6/046-6; 472-7/046-7.

1 The court has already determined, based on the body of
2 evidence submitted with plaintiffs' motion under section 1806(f)
3 (Doc #472/046), that plaintiffs have made out a prima facie case of
4 electronic surveillance under the standard set forth in United
5 States v Alter. Under Alter, "the burden was then on the
6 government to squarely affirm or deny those charges * * * [with an
7 affidavit that is] factual, unambiguous and unequivocal." 482 F2d
8 at 1027. In FISA proceedings, 50 USC § 1806(f) provides a
9 procedure by which the government may do this in camera, thus
10 avoiding the disclosure of sensitive national security information.
11 See In Re NSA Telecom Litigation, 564 F Supp 2d at 1131-35.
12 Defendants declined to avail themselves of section 1806(f)'s in
13 camera review procedures and have otherwise declined to submit
14 anything to the court squarely addressing plaintiffs' prima facie
15 case of electronic surveillance.

16 Instead, defendants have interposed three arguments
17 intended to undermine plaintiffs' claim for relief. All three
18 arguments lack merit.

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21 First, defendants contend that "the mandate of the Court
22 of Appeals in this case forecloses plaintiffs' motion. The Ninth
23 Circuit expressly held that the information necessary for
24 plaintiffs to establish their standing has been excluded from this
25 case pursuant to the [SSP]," citing Al-Haramain Islamic Foundation,
26 Inc v Bush, 507 F3d at 1203-05. The passages to which defendants
27 refer are as follows:

28 Al-Haramain cannot establish that it suffered injury
in fact, a "concrete and particularized" injury,

1 because the Sealed Document, which Al-Haramain
2 alleges proves that its members were unlawfully
3 surveilled, is protected by the [SSP]. At oral
4 argument, counsel for Al-Haramain essentially
5 conceded that Al-Haramain cannot establish standing
6 without reference to the Sealed Document. When asked
7 if there is data or information beyond the Sealed
8 Document that would support standing, counsel offered
9 up no options, hypothetical or otherwise. Thus,
10 Al-Haramain has indicated that its ability to
11 establish injury in fact hinges entirely on a
12 privileged document. It is not sufficient for
13 Al-Haramain to speculate that it might be subject to
14 surveillance under the TSP simply because it has been
15 designated a "[SDGT]."

16 * * *

17 Because we affirm the district court's conclusion
18 that the Sealed Document, along with data concerning
19 surveillance, are privileged, and conclude that no
20 testimony attesting to individuals' memories of the
21 document may be admitted to establish the contents of
22 the document, Al-Haramain cannot establish that it
23 has standing, and its claims must be dismissed,
24 unless FISA preempts the [SSP].

25 Al-Haramain, 507 F3d at 1205.

26 Defendants' enthusiasm for these passages is
27 understandable, but the court does not agree that plaintiffs are
28 now "foreclosed" from attempting to establish standing without the
Sealed Document. It is apparent from the opinion that the court of
appeals, having asked plaintiffs' counsel whether the Sealed
Document was necessary for plaintiffs to establish standing, simply
did not contemplate plaintiffs' later attempt, in light of newly-
available public evidence, to build a non-classified evidentiary
basis for their suit.

During oral argument on the instant cross-motions, the
court asked plaintiffs' attorney about the apparent discrepancy
between his representation to the court of appeals in August 2007
that plaintiffs required the Sealed Document to establish standing

1 and his contention in the district court in 2009 that plaintiffs
2 could establish standing without classified evidence of any kind.

3 At oral argument counsel for Al-Haramain
4 essentially conceded that Al-Haramain cannot
5 establish standing without reference to the Sealed
6 Document. What's the background of that? And what
7 is the effect of that statement for purpose[s] of
8 the standing determination here?

9 RT September 23, 2009, as amended Doc #712/114⁴ at 26-27.

10 Plaintiffs' counsel responded that he had not attempted to marshal
11 public evidence because the Oregon district court had ruled that
12 plaintiffs could use the Sealed Document. Counsel went on to
13 explain that there were two crucial pieces of public evidence that
14 he had not discovered as of the August 2007 oral argument: (1) a
15 speech given on October 22, 2007 by FBI Deputy Director John S
16 Pistole to the American Banker's Association stating that, in
17 developing OFAC's case against Al-Haramain, "we used other
18 investigative tools — like records checks, surveillance, and
19 interviews of various subjects" (see Eisenberg Decl Exh S, Doc
20 #657-3/099-3 at 51) and (2) "the testimony by members of the Bush
21 administration before Congress that told us how they intercept
22 communications, which is they do it on a wire from routing stations
23 within the United States, which makes it electronic surveillance
24 within the meaning of FISA * * *." Doc #712/114 at 28. Counsel
25 further expressed doubt that the court of appeals could have

26 ⁴ The original transcript of the September 23, 2009 hearing was
27 filed on October 6, 2009 (Doc #711/107). At the stipulated request
28 of the parties, the transcript was corrected and an amended version
of the transcript was filed on February 22, 2010 (Doc #712/114).
Citations herein to the record of proceedings at the September 23,
2009 hearing are to the amended transcript.

26

1 contrary to the court of appeals' interpretation of FISA in Al-
2 Haramain.

3 Under defendants' theory, executive branch officials may
4 treat FISA as optional and freely employ the SSP to evade FISA, a
5 statute enacted specifically to rein in and create a judicial check
6 for executive-branch abuses of surveillance authority. For
7 example, the House Report on FISA noted: "In the past several
8 years, abuses of domestic national security surveillances have been
9 disclosed. This evidence alone should demonstrate the
10 inappropriateness of relying solely on [E]xecutive branch
11 discretion to safeguard civil liberties." Foreign Intelligence
12 Surveillance Act of 1978, H R Rep No 95-1283 Part I at 21. See
13 also In Re NSA Telecom Litigation, 564 F Supp 2d at 1117-24.

14 Perhaps sensitive to the obvious potential for
15 governmental abuse and overreaching inherent in defendants' theory
16 of unfettered executive-branch discretion, defendants protest that
17 "the Government does not rely on an assertion of the [SSP] to cover-
18 up alleged unlawful conduct." Doc #668/103 at 37. Rather, they
19 assert, it does so because "[d]isclosure of whether or not
20 communications related to al Qaeda have been intercepted, when, how,
21 of who [sic], and under what authority would reveal methods by which
22 the government has or has not monitored certain communications
23 related to that organization." Id. By "under what authority,"
24 presumably, defendants mean "whether or not pursuant to a FISA
25 warrant" — the very heart of the cause of action under 50 USC
26 § 1810. This fact — the presence or absence of a FISA warrant —
27 is something defendants assert may be cloaked by the SSP,
28 notwithstanding this court's July 2008 determination, pursuant to

1 the court of appeals' remand instructions, that FISA displaces the
2 SSP in cases within the reach of its provisions and that "this is
3 such a case." In re NSA Telecom Litigation, 564 F Supp 2d at 1124.

4 In an impressive display of argumentative acrobatics,
5 defendants contend, in essence, that the court's orders of June 3
6 and June 5, 2009 setting the rules for these cross-motions make
7 FISA inapplicable and that "the Ninth Circuit's rulings on the
8 privilege assertion therefore control the summary judgment motions
9 now before the Court." Doc #672/105 at 6. In other words,
10 defendants contend, this is not a FISA case and defendants are
11 therefore free to hide behind the SSP all facts that could help
12 plaintiffs' case. In so contending, defendants take a flying leap
13 and miss by a wide margin. Defendants forewent the opportunity to
14 invoke the section 1806(f) procedures Congress created in order for
15 executive branch agencies to establish "the legality of the
16 surveillance," including whether a FISA warrant for the
17 surveillance existed. Rather, in response to plaintiffs' motion
18 under section 1806(f), defendants declined to make the submissions
19 provided for by that section and instead asserted:

20 The discretion to invoke Section 1806(f) belongs to
21 the Attorney General, and under the present
22 circumstances — where there has been no final
23 determination that those procedures apply in this case
24 to overcome the Government's successful assertion of
25 privilege and where serious harm to national security
26 is at stake — the Attorney General has not done so.

27 Doc #499/051 at 26-27 and 595 F Supp 2d at 1088. Similarly,
28 defendants could readily have availed themselves of the court's
processes to present a single, case-dispositive item of evidence at
one of a number of stages of this multi-year litigation: a FISA
warrant. They never did so, and now illogically assert that the

1 existence of a FISA warrant is a fact within the province of the
2 SSP, not FISA.

3 But the court of appeals' opinion contemplated that the
4 case would move forward under FISA if FISA were deemed to displace
5 the SSP. The court of appeals did not contemplate that the
6 judicial process should be intentionally stymied by defendants'
7 tactical avoidance of FISA:

8 Under FISA, 50 USC §§ 1801 et seq, if an "aggrieved
9 person" requests discovery of materials relating to
10 electronic surveillance, and the Attorney General
11 files an affidavit stating that the disclosure of
12 such information would harm the national security of
13 the United States, a district court may review in
14 camera and ex parte the materials "as may be
15 necessary to determine whether the surveillance of
16 the aggrieved person was lawfully authorized and
17 conducted." 50 USC § 1806(f). The statute further
18 provides that the court may disclose to the aggrieved
19 person, using protective orders, portions of the
20 materials "where such disclosure is necessary to make
21 an accurate determination of the legality of the
22 surveillance." Id. The statute, unlike the common
23 law [SSP], provides a detailed regime to determine
24 whether surveillance "was lawfully authorized and
25 conducted." Id.

26 * * *

27 [T]he FISA issue remains central to Al-Haramain's
28 ability to proceed with this lawsuit.

29 Al-Haramain, 507 F3d at 1205-06.

30 At oral argument, plaintiffs' counsel argued that the
31 burden was on defendants to show that they had a warrant because,
32 given that the TSP was in place "in order to evade FISA, * * * why
33 on earth would [defendants] get a FISA warrant to perform
34 surveillance that they believed they had no need to get a FISA
35 warrant for?" and because knowledge of the existence or non-
36 existence of a FISA warrant was "within [defendants'] exclusive
37 \\

1 knowledge." Doc #712/114 at 8. The court finds merit in these
2 arguments.

3 In summary, because FISA displaces the SSP in cases
4 within its purview, the existence of a FISA warrant is a fact that
5 cannot be concealed through the device of the SSP in FISA
6 litigation for the reasons stated in the court's July 8, 2008
7 order, 564 F Supp 2d 1109. Plaintiffs have made out a prima facie
8 case and defendants have foregone multiple opportunities to show
9 that a warrant existed, including specifically rejecting the method
10 created by Congress for this very purpose. Defendants' possession
11 of the exclusive knowledge whether or not a FISA warrant was
12 obtained, moreover, creates such grave equitable concerns that
13 defendants must be deemed estopped from arguing that a warrant
14 might have existed or, conversely, must be deemed to have admitted
15 that no warrant existed. The court now determines, in light of all
16 the aforementioned points and the procedural history of this case,
17 that there is no genuine issue of material fact whether a warrant
18 was obtained for the electronic surveillance of plaintiffs. For
19 purposes of this litigation, there was no such warrant for the
20 electronic surveillance of any of plaintiffs.

21
22 3

23 Defendants' third argument is essentially to quarrel with
24 the court's finding that plaintiffs have made out a prima facie
25 case of electronic surveillance, asserting that plaintiffs'
26 "evidence falls far short of establishing that the Government
27 conducted warrantless electronic surveillance under the TSP of
28 \\\

1 plaintiffs' conversations in March and April 2004." Doc #668/103
2 at 28.

3 Because defendants' argument rests on a faulty
4 understanding of the parties' burdens as discussed in the preceding
5 section, a lengthy discussion of these points is not warranted.
6 The following discussion of defendants' handling of certain items
7 of evidence is included for the sake of completeness and is
8 intended to be illustrative. Plaintiffs must — and have — put
9 forward enough evidence to establish a prima facie case that they
10 were subjected to warrantless electronic surveillance.

11 Among plaintiffs' exhibits is a memorandum from Howard
12 Mendelsohn, Deputy Assistant Secretary at the Department of the
13 Treasury to defendant Adam J Szubin, Director of OFAC, dated
14 February 6, 2008. Eisenberg Decl Exh Z, Doc #657-4/099-4. This
15 lengthy, redacted document bearing the words "Top Secret" at the
16 top has a stated subject of "redesignation of Al-Haramain Islamic
17 Foundation locations in the United States (AHF-OREGON) and AHF
18 official Soliman AL-BUTHE pursuant to [Executive Order] 13224." Id
19 at 126. In it, Soliman al-Buthe (referred elsewhere in the record
20 as "Al-Buthi") is described as "the Treasurer of AHF-OREGON." Id
21 at 127. The document states that "AL-BUTHE was intercepted in some
22 four conversations with Al-Timimi" on February 1, 2003. Id at 131.
23 Al-Buthi, meanwhile, is alleged in the FAC to be a director of Al-
24 Haramain (Doc #458/035 ¶ 34) and the individual whose conversations
25 with Ghafoor and Belew plaintiffs allege were intercepted by means
26 of electronic surveillance in March and April 2004. Id at ¶¶ 32,
27 33 and Ghafoor & Belew Decls, Doc ##657-6/099-6, 657-7/099-7.
28 These documents buttress each other, as does the published speech

1 by John Pistole to the American Bankers' Association admitting
2 "surveillance" of Al-Haramain Oregon. Eisenberg Decl Exh S, Doc
3 #657-3/099-3.

4 Defendants attack as insufficient each item of evidence
5 individually, ignoring the cumulative impact of the various
6 documents. As to the Pistole speech, they quibble: "The mere
7 statement that 'surveillance [] was used' in investigating the
8 connections between al Qaeda and [Al-Haramain Islamic Foundation's]
9 worldwide activities establishes nothing as to who, where, when,
10 and how any such surveillance was directed." Doc #668/103 at 32.
11 As to the al-Buthi/al-Timimi intercepts, defendants write: "That
12 Mr Al-Timimi was the target of interception and was overheard
13 speaking with Mr Al-Buthe * * * does not indicate that any of the
14 named plaintiffs in this case were the target of or subject to
15 surveillance, or where or how any such surveillance had occurred,
16 including whether or not it was warrantless surveillance on a wire
17 in the United States or authorized under FISA." Id at 32.

18 This argument ignores that one need not be a target of
19 electronic surveillance to be an "aggrieved person" under FISA's
20 section 1801(k) but may be "any other person whose communications
21 or activities were subject to electronic surveillance." Section
22 1801(k) is quoted in section I, supra. It also ignores that Al-
23 Haramain is the primary plaintiff in this action and surveillance
24 of one of its officers or directors amounts to surveillance of Al-
25 Haramain. And there is the further point that, even assuming
26 arguendo that al-Timimi was the original target of surveillance, a
27 productive wiretap of al-Timimi's conversations with al-Buthi would
28 have led to separate electronic surveillance of al-Buthi beginning

1 in early 2003. This inference lends credence to the allegations of
2 Belew and Ghafoor that their conversations with al-Buthi in 2004
3 were wiretapped.

4 At oral argument, defendants' counsel commented rather
5 obliquely about the al-Buthi/al-Timimi intercept memorandum that
6 "[t]his demonstrates that the surveillance that may have been at
7 issue in this case did not, in fact, have to be of an individual
8 associated with Al-Haramain, could have been of someone else, could
9 have been other sources." Doc #712/114 at 34. Counsel then
10 asserted "[t]hat surveillance * * * could well have been authorized
11 by the FISA. I actually believe that it was." Id. Further
12 embellishing their attempts to create an aura of uncertainty and
13 mystery around plaintiffs' prima facie evidence, defendants note:
14 "even if the plaintiffs had been subject to surveillance (which
15 itself is not established by the evidence cited), nothing
16 establishes how such surveillance may have occurred." Doc #668/103
17 at 29.

18 Defendants have also attacked plaintiffs' prima facie
19 case by arguing that some of the documents, including the al-
20 Buthi/al-Timimi intercept memorandum, demonstrate that links
21 between Al-Haramain and al-Qaeda were suspected or known well
22 before September 2004, the date on which OFAC designated Al-
23 Haramain as a SDGT organization and publicly announced a connection
24 between it and Osama bin-Laden. See, for example, Defendants'
25 Third Motion to Dismiss, Doc #475/049 at 23. But later-disclosed,
26 formerly Top Secret information about secret investigations before
27 2004 cannot refute plaintiffs' assertion that at no time before
28 September 2004 did the government publicly assert that Al-Haramain

1 had links to Osama bin-Laden, a fact that suggests recently-
2 acquired information in which the government had great confidence.
3 Alone, no single item of evidence is sufficient, but together the
4 various pieces establish a prima facie case.

5 Defendants' nit-picking of each item of plaintiffs'
6 evidence, their remarkable insinuation (unsupported by any evidence
7 of their own) that the al-Buthi/al-Timimi intercepts might have
8 been pursuant to a FISA warrant and their insistence that they need
9 proffer nothing in response to plaintiffs' prima facie case do not
10 amount to an effective opposition to plaintiffs' motion for summary
11 judgment.

12
13 B

14 The parties' submissions establish that there is no
15 genuine issue as to the following material facts. These facts,
16 most of which are summarized from plaintiffs' pleadings in the FAC,
17 are annotated with citations to plaintiffs' evidence and, in many
18 cases, with citations to identical evidence previously submitted to
19 the court by defendants with their third motion to dismiss
20 purportedly for calling attention to "the inadequacy of plaintiffs'
21 evidence." Doc #475/049 at 18 n 4. Defendants have not disputed
22 the authenticity or accuracy of the items of evidence they
23 submitted with the motion to dismiss nor the veracity or
24 credibility of any statements in declarations for the truth of any
25 matter asserted therein; rather, they have challenged the
26 inferences that could properly be drawn. The court rejected
27 defendants' legal arguments in its order dated January 5, 2009 (595
28 F Supp 2d 1077) and above.

1 1. During or after the fall of 2001, President
2 George W Bush authorized the NSA to intercept
3 international communications into and out of the United
4 States of persons linked to "al-Qaeda or related
5 terrorist organizations." United States Department of
6 Justice, "Legal Authorities Supporting the Activities of
7 the National Security Agency Described by the
8 President," January 19, 2006 (Eisenberg Decl Exh AA, Doc
9 #657-5/099-5 at 6).

10 2. In October 2001, the Treasury Department
11 created "Operation Green Quest" to track financing of
12 terrorist activities, one of the targets of which were
13 foreign branches of the Saudi Arabia-based Al-Haramain
14 Islamic Foundation, a fact admitted by Treasury
15 Department Deputy Secretary Kenneth W Dam in testimony
16 before Congress on August 1, 2002. FAC ¶ 24. Exhibit 5
17 to Defendants' Third Motion to Dismiss or, in the
18 Alternative, for Summary Judgment ("Defs' 3rd MTD Exh
19 5"), Doc #475-2/049-2 at 157, 159.

20 3. In April 2002, the FBI created its Terrorist
21 Financing Operations Section ("TFOS"), as admitted by
22 FBI Counterterrorism Division Acting Assistant Director
23 Gary M Bald in testimony before Congress on March 4,
24 2004; Eisenberg Decl Exh J, Doc #657-3/099-3 at 2; on
25 May 13, 2003, through a Memorandum of Understanding
26 between the Department of Justice and the Department of
27 Homeland Security, the FBI was designated as the lead
28 department to investigate potential terrorist-related

1 financial transactions; id at 4; the TFOS acquired,
2 analyzed and disseminated data and information,
3 including telecommunications data from a variety of
4 sources, including "Internet Service Providers, the
5 Telecommunications Industry," among others; id at 4;
6 TFOS took over the investigation of Al-Haramain Islamic
7 Foundation "pertaining to terrorist financing;" id at 7;
8 in February 2004, the FBI executed a search warrant on
9 plaintiff Al-Haramain's office in Ashland, Oregon and
10 TFOS provided operational support, including document
11 and data analysis, in the investigation of plaintiff Al-
12 Haramain. FAC ¶ 25. Eisenberg Decl Exh J, Doc #657-
13 3/099-3 at 7; Defs' 3rd MTD Exh 6, Doc #475-2/049-2 at
14 164-66, 168. Bald's March 4, 2004 testimony included no
15 mention of purported links between plaintiff Al-Haramain
16 and Osama bin-Laden. FAC ¶ 26. Eisenberg Decl Exh J,
17 Doc #657-3/099-3 at 7; Doc #475-2 at 168.

18 4. TFOS "has access to data and information" from
19 "the Intelligence Community" and has "[t]he ability to
20 access and obtain this type of information in a time
21 sensitive and urgent manner" as admitted by FBI Deputy
22 Director John S Pistole in testimony before Congress on
23 September 25, 2003. FAC ¶ 27. Eisenberg Decl Exh L,
24 Doc #657-3/099-3 at 18.

25 5. In conducting investigations of terrorist
26 financing, OFAC officers use "classified * * *
27 information sources" as admitted by OFAC Director R
28 Richard Newcomb in testimony before Congress on June 16,

2004. FAC ¶ 28. Eisenberg Decl Exh M, Doc #657-3/099-3 at 27; Defs' 3rd MTD Exh 8, Doc #475-2/049-2 at 199.

6. In 2004 the FBI, under the direction of defendant Mueller, undertook activity using information produced by the NSA through the warrantless surveillance program as admitted by defendant Mueller in testimony before the House Judiciary Committee on July 26, 2007. FAC ¶ 27. Eisenberg Decl Exh I, Doc #657-2/099-2 at 43; Defs' 3rd MTD Exh 2, Doc #475-2/049-2 at 81.

7. The FBI's search warrant on Al-Haramain's Ashland, Oregon, office was executed on February 18, 2004. Eisenberg Decl Exh Z, Doc #657-4/099-4 at 33; Defs' 3rd MTD Exh 19, Doc #475-3/049-3 at 213. On February 19, 2004, the Treasury Department's OFAC blocked Al-Haramain's assets pending an investigation of possible crimes relating to currency reporting and tax laws as admitted in a press release of that date by the Treasury Department's Office of Public Affairs; the press release contained no mention of purported links between plaintiff Al-Haramain and Osama bin-Laden. FAC ¶¶ 30-31. Eisenberg Decl Exh K, Doc #657-3/099-3 at 13; Defs' 3rd MTD Exh 9, Doc #475-2/049-2 at 208.

8. Soliman al-Buthi was subjected to electronic surveillance by one or more United States government entities during telephone conversations with al-Timimi on February 1, 2003. Eisenberg Decl Exh Z, Doc #657-4/099-4 at 36-37; Defs' 3rd MTD Exh 19, Doc #475-3/049-3

1 at 216-17. Soliman al-Buthi was a senior official of
2 Al-Haramain in 2003. FAC ¶ 32; Doc #475-3/049-3 at 213.

3 9. Soon after the blocking of plaintiff Al-
4 Haramain's assets on February 19, 2004, plaintiff Belew
5 spoke by telephone with Soliman al-Buthi on the
6 following dates: March 10, 11 and 25, April 16, May 13,
7 22 and 26, and June 1, 2 and 10, 2004. Belew was
8 located in Washington DC; al-Buthi was located in
9 Riyadh, Saudi Arabia. During the same period, plaintiff
10 Ghafoor spoke by telephone with al-Buthi approximately
11 daily from February 19 through February 29, 2004 and
12 approximately weekly thereafter. Ghafoor was located in
13 Washington DC; al-Buthi was located in Riyadh, Saudi
14 Arabia. (The FAC includes the telephone numbers used in
15 the telephone calls referred to in this paragraph.) FAC
16 ¶¶ 34-35. Declarations of Asim Ghafoor, Doc #657-6/099-
17 6 and Wendell Belew, Doc #657-7/099-7.

18 10. In the telephone conversations between Belew
19 and al-Buthi, the parties discussed issues relating to
20 the legal representation of defendants, including Al-
21 Haramain, named in a lawsuit brought by victims of the
22 September 11, 2001 attacks. Names al-Buthi mentioned in
23 the telephone conversations with Ghafoor included
24 Mohammad Jamal Khalifa, spouse of one of Osama bin-
25 Laden's sisters, and Safar al-Hawali and Salman al-Auda,
26 clerics whom Osama bin-Laden claimed had inspired him.
27 In the telephone conversations between Ghafoor and al-
28 Buthi, the parties also discussed logistical issues

1 relating to payment of Ghafoor's legal fees as defense
2 counsel in the lawsuit. Ghafoor & Belew Decls, Doc
3 ##657-6/099-6, 657-7/099-7.

4 11. In a letter to Al-Haramain's lawyer Lynne
5 Bernabei dated April 23, 2004, OFAC Director Newcomb
6 stated that OFAC was considering designating Al-Haramain
7 as a SDGT organization based on unclassified information
8 "and on classified documents that are not authorized for
9 public disclosure." FAC ¶ 36. Eisenberg Decl Exh N,
10 Doc #657-3/099-3 at 29; Defs' 3rd MTD Exh 10, Doc #475-
11 2/049-2 at 210. In a follow-up letter to Bernabei dated
12 July 23, 2004, Newcomb reiterated that OFAC was
13 considering "classified information not being provided
14 to you" in determining whether to designate Al-Haramain
15 as an SDGT organization. ¶ 37. Eisenberg Decl Exh O,
16 Doc #657-3/099-3 at 31; Defs' 3rd MTD Exh 11, Doc #475-
17 2/049-2 at 212. On September 9, 2004, OFAC declared
18 plaintiff Al-Haramain to be an SDGT organization. FAC
19 ¶ 38. Eisenberg Decl Exh P, Doc #657-3/099-3 at 33;
20 Defs' 3rd MTD Exh 12, Doc #475-2/049-2 at 214.

21 12. In a press release issued on September 9,
22 2004, the Treasury Department stated that the
23 investigation of Al-Haramain showed "direct links
24 between the US branch [of Al-Haramain] and Usama bin
25 Laden"; this was the first public claim of purported
26 links between Al-Haramain and Osama bin-Laden. FAC
27 ¶¶ 39-40. Eisenberg Decl Exh P, Doc #657-3/099-3 at 33;
28 Defs' 3rd MTD Exh 12, Doc #475-2/049-2 at 214.

1 13. In a public declaration filed in this
2 litigation dated May 10, 2006, FBI Special Agent Frances
3 R Hourihan stated that "the classified document that was
4 inadvertently disclosed by a government employee without
5 proper authorization" (i e, the Sealed Document) "was
6 related to the terrorist designation" of Al-Haramain.
7 FAC ¶ 41. Eisenberg Decl Exh Q, Doc #657-3/099-3 at 36-
8 37.

9 14. FBI Deputy Director Pistole acknowledged that
10 the FBI "used * * * surveillance" in connection with
11 defendant OFAC's 2004 investigation of Al-Haramain but
12 stated that "it was the financial evidence" provided by
13 financial institutions "that provided justification for
14 the initial designation" of Al-Haramain, in a speech
15 delivered by Mr Pistole on October 22, 2007 at a
16 conference of the American Bankers Association and
17 American Bar Association on money laundering, the text
18 of which appears on the FBI's official Internet website.
19 FAC ¶¶ 42-43. Eisenberg Decl Exh S, Doc #657-3/099-3 at
20 51; Defs' 3rd MTD Exh 13, Doc #475-3/049-3 at 6. A
21 court document filed by the United States Attorney for
22 the District of Oregon on August 21, 2007 referred to
23 the February 19, 2004 asset-blocking order as a
24 "preliminary designation" and the September 9, 2004
25 order as "a formal designation." FAC ¶ 44. Eisenberg
26 Decl Exh U, Doc #657-4/099-4 at 8.

27 15. To allege that the above-referenced
28 telecommunications between al-Buthi and plaintiffs Belew

1 and Ghafoor were wire communications and were
2 intercepted by defendants within the United States,
3 plaintiffs cite to several public statements by
4 government officials that most international
5 communications today are "on a wire" and therefore
6 subject to FISA's warrant requirements, including: July
7 26, 2006 testimony by defendant Alexander and CIA
8 Director Michael Hayden (Eisenberg Decl Exh V, Doc #657-
9 4/099-4 at 12(see also id Exh W at 19-20); Defs' 3rd MTD
10 Exh 15, Doc #475-3/049-3 at 23); May 1, 2007 testimony
11 by Director of National Intelligence Michael McConnell
12 (Eisenberg Decl Exh W, Doc #657-4/099-4 at 16-18); and
13 September 20, 2007 testimony by McConnell before the
14 House Select Intelligence Committee: "[t]oday * * *
15 [m]ost international communications are on a wire, fiber
16 optical cable," and "on a wire, in the United States,
17 equals a warrant requirement [under FISA] even if it was
18 against a foreign person located overseas." FAC ¶ 48a-
19 c. Eisenberg Decl Exh X, Doc #657-4/099-4 at 24; Defs'
20 3rd MTD Exh 16, Doc #475-3/049-3 at 60-61.

21 16. A memorandum dated February 6, 2008, to
22 defendant Szubin from Treasury Department Office of
23 Intelligence and Analysis Deputy Assistant Secretary
24 Howard Mendelsohn, which was publicly disclosed during a
25 2005 trial, acknowledged electronic surveillance of four
26 of al-Buthi's telephone calls on February 1, 2003. FAC
27 ¶ 51. Eisenberg Decl Exh Z, Doc #657-4/099-4 at 32-38;
28 Defs' 3rd MTD Exh 19, Doc #475-3/049-3 at 216-17.

1 Because defendants have failed to establish the existence
2 of a genuine issue of material fact warranting denial of
3 plaintiffs' motion for summary judgment on the issue of defendants'
4 liability under FISA, plaintiffs' motion must be, and hereby is,
5 GRANTED. Defendants' motion for summary judgment is DENIED.

6
7 IV

8 Among the unresolved minor issues in this litigation is
9 that of the liability of defendant FBI Director Robert S Mueller
10 III in his individual, as opposed to official, capacity. The
11 original complaint did not specify whether the four individual
12 defendants were sued in their individual, as opposed to official,
13 capacities but plaintiffs later asserted that "a nonspecific
14 complaint may be characterized as alleging both official and
15 personal capacity liability" and sought to serve defendants in
16 their individual capacities some two years after filing the
17 complaint. Doc #447/030. In its July 2008 order dismissing the
18 complaint, the court granted plaintiffs leave, if they chose to
19 amend their pleading, to serve "all unserved defendants" with their
20 amended complaint within fifteen days of filing it with the court.
21 564 F Supp 2d at 1137.

22 In the FAC, defendant Mueller is the only individual
23 defendant named "in his official and personal capacities." Doc
24 #458/035 at 1, 2. Shortly after the FAC was filed, plaintiffs
25 filed an acknowledgement of service relating to defendant Mueller
26 (Doc #463/041) and counsel appeared for defendant Mueller in his
27 individual capacity (Doc # 460/037). There were no similar filings
28 relating to the other individual defendants and no subsequent

1 discussion of proceedings against any individual defendant but
2 Mueller in the individual capacity. Mueller is therefore the only
3 defendant against whom plaintiffs seek to proceed in an individual
4 capacity.

5 In a footnote to their moving papers, plaintiffs merely
6 note that their motion does not "address the personal liability of
7 defendant [Mueller], who, by agreement of the parties, has not yet
8 made an appearance in this action." Doc #657/099 at 39 n 5. At
9 oral argument, plaintiffs' counsel stated "at this point we believe
10 Mr Mueller is a corollary we needn't get to" and "we really don't
11 see any need to pursue that avenue." Doc #712/114 at 26. The
12 court sees no reason to allow this issue to be held open for future
13 proceedings. The court concludes that the nature of the wrongdoing
14 by governmental actors alleged and established herein is official
15 rather than individual or personal. See discussion in section II,
16 supra. The specific factual allegations against defendant Mueller,
17 moreover, plainly concern actions taken in his official capacity:
18 the FAC alleges that Mueller testified before Congress that he had
19 had "serious reservations about the warrantless wiretapping
20 program." Doc #458/035 at 5.

21 Accordingly, the court now DISMISSES without leave to
22 amend all claims in the FAC as to defendant Mueller in his
23 individual capacity. Defendant Mueller will remain a party to this
24 action only in his official capacity.

25
26 V

27 Finally, the court turns to plaintiffs' request that the
28 court make two rulings on the substantive matters before it on

1 these cross-motions — one based on the public evidence presented,
2 and an alternate ruling based on its in camera review of the Sealed
3 Document. Doc #671/104 at 6. At oral argument, counsel argued
4 that only with the alternate ruling would the court have made a
5 complete record for appellate review. Doc #712/114 at 10-15.
6 While the court recognizes the merit of counsel's argument, it has
7 concluded that including an alternative ruling based on the Sealed
8 Document would complicate the record unduly and, perhaps, be
9 perceived as unfair to defendants (who have refrained from
10 submitting classified evidence in connection with this round of
11 briefing). Accordingly, the request to consider the Sealed
12 Document in connection with these cross-motions is DENIED.

14 VI

15 Having prevailed on their motion for summary judgment of
16 liability on their FISA claim, plaintiffs now face a decision
17 regarding the course of the remaining proceedings in this case.
18 They may either: (1) take steps to prosecute the remaining claims
19 in the FAC or (2) they may voluntarily dismiss those claims in
20 order to take the steps necessary for the entry of judgment on the
21 FISA claim. Plaintiffs shall advise the court, no later than April
22 16, 2010 and in the manner set forth below, of their election.

23 Should plaintiffs elect the first course — to pursue
24 their remaining claims in lieu of seeking entry of judgment — they
25 shall, by April 16, 2010, contact the clerk to obtain a date for a
26 case management conference to be held not later than May 28, 2010.

27 Should plaintiffs choose the second course, they shall
28 submit a request for dismissal of their remaining claims together

1 with a proposed form of judgment reflecting: their computation of
2 damages under 50 USC § 1810 consistent with counsel's statements at
3 oral argument (Doc #712/114 at 24-25) and that statute; their
4 entitlement to attorney fees "and other investigation and
5 litigation costs" under section 1810(c); and the items of equitable
6 relief sought in the FAC to which they believe they are entitled
7 under this order. If plaintiffs believe that further proceedings
8 are required in order for the court to determine the quantum of
9 damages or other specifics of the judgment, they shall so advise
10 the court in a separate written request accompanying their proposed
11 form of judgment.

12 Defendants may submit an alternative proposed form of
13 judgment or a written response to plaintiffs' submissions within
14 fourteen days after plaintiffs file their proposed form of
15 judgment. Following entry of judgment herein, plaintiffs' motion
16 for attorney fees and costs shall be filed in accordance with FRCP
17 54(d) and Civil Local Rule 54.

18 The parties are admonished that all future submissions to
19 the court shall comply with paragraph 1.4 of the undersigned
20 judge's standing order: "Chambers copies * * * must include on
21 each page the running header created by the ECF system."

22
23 IT IS SO ORDERED.

24
25
26 

27 VAUGHN R WALKER
28 United States District Chief Judge